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Issue Date: 03 August 2005

Case No.: 2004-LHC-1208

OWCP No.: 07-168033

IN THE MATTER OF

GREGORY P. NELSON.
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

VIRGINIA L. LoCOCO, ESQ.,
On Behalf of the Claimant

DONALD P. MOORE, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"). The claim is brought by Gregory P. Nelson, "Claimant," against Northrop Grumman Ship Systems, Inc. ("Avondale"), "Employer." Claimant sustained a back injury on July 9, 2003 during his employment with Northrop Grumman. The parties dispute causation, among other issues. A hearing was held on March 14, 2005 in Gulfport, Mississippi, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1; and

2) Respondent's Exhibits Nos. 1-15; and

3) Claimant's Exhibits Nos. 1-22.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue.

2) The date of Claimant's injury/accident was approximately July 9, 2003.

3) Claimant's injury was in the course and scope of employment.

4) An employer/employee relationship existed at the time of the accident.

5) Employer was advised of the injury on July 9, 2003.

6) Employer filed a Notice of Controversion on September 18, 2003.

7) An Informal Conference was held on February 3, 2004.

8) Claimant's temporary total disability began on September 4, 2003.

9) Temporary total disability was paid from September 4, 2003 through December 10, 2003, fourteen weeks, at a rate of $375.49 per week, for a total of $5,256.86.

10) Some medical benefits were paid by Avondale until approximately December 2003 or January 2004. Payment for surgery and follow-up with Dr. Smith was paid by Ingalls under previous injury settlement with open medicals.

11) Claimant has a permanent disability.

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.
[2] JX-1.

ISSUES

The unresolved issues in these proceedings are:

(1) Whether or not Claimant's need for surgery is causally related to the July 9, 2003 accident;

(2) Nature and Extent of Disability; particularly, whether or not Claimant's current disability and future disability are causally related to the July 9, 2003 accident;

(3) Whether Claimant's July 9, 2003 accident was only a temporary aggravation of his pre-existing condition;

(4) Claimant's date of maximum medical improvement;

(5) Average Weekly Wage;

(6) Special Fund Relief;

(7) Attorney's Fees, Penalties, and Interest; and

(8) Employer's credit for compensation and wages paid.

SUMMARY OF THE EVIDENCE

Gregory Nelson is forty-eight years old. He possesses an eighth grade education and GED. Throughout his work history, he was employed primarily as a structural welder. TR 24-25. The current claim results from a back injury he sustained at Avondale on July 9, 2003. However, Claimant suffered a back injury in 1987 with a previous employer, Ingalls. Claimant's prior back injury is relevant to the issues raised in this case.

1987 Injury

On January 8, 1987, Mr. Nelson suffered a back injury while employed by a previous employer, Ingalls. TR 26. He was treated by Dr. McCloskey and complained of low back pain and pain radiating into his left hip and leg. RX-8, p. 18. His initial x-rays and CAT scan were normal. RX-8, p. 16. A subsequent MRI and CAT scan exhibited some abnormalities; however, they were not compelling. RX-8, p. 33. An EMG-NCV suggested radiculopathy on the left side, and Dr. McCloskey diagnosed him with low back injury with evidence of left-sided radiculopathy. RX-8, p. 24-25. On May 19, 1987, a discogram indicated lumbar disc disease at L4 and L5. RX-8, p. 41. Dr.

McCloskey treated Mr. Nelson with a series of epidural blocks and prescription medications. Dr. McCloskey placed him at maximum medical improvement ("MMI") on February 11, 1988 and released him to light duty. CX-1, p. 77. Mr. Nelson continued to receive prescriptions from Dr. McCloskey. RX-8.

As a result of this injury, Mr. Nelson filed a claim under the Act, which was litigated and returned a favorable decision on February 21, 1991, awarding him permanent partial disability benefits and medical benefits. TR 26; RX-10. On August 26, 1992, the Board modified the ALJ's decision, altering only the dates and rate of compensation. RX-11. In February 1993, Mr. Nelson settled his award of permanent partial disability benefits with Ingalls for a lump sum payment of $60,000; the medical benefits remained open. RX-12; TR 54.

Mr. Nelson continued to see Dr. McCloskey. On June 8, 1993, Dr. McCloskey diagnosed him with chronic post traumatic low back syndrome and, pursuant to Mr. Nelson's request, prescribed a limited number of chiropractic sessions. Mr. Nelson reported that the sessions were helpful. RX-8, p. 150. On December 23, 1993, Claimant requested a functional capacity evaluation ("FCE") to reevaluate his work restrictions. CX-1, p. 155; TR 28. Mr. Nelson testified that he asked for the FCE because Dr. McCloskey told him to do so if he felt better and did not ask Dr. McCloskey to return him to regular duty. TR 56. The FCE was conducted on January 5, 1994 and found him capable of medium heavy work. Medium heavy work is defined as maximum lifting of seventy-five pounds on an occasional basis, thirty five pounds on a frequent basis, and fifteen pounds on a constant basis. CX-1, p. 156.

Pursuant to the 1994 FCE, Mr. Nelson was physically capable of returning to his usual employment as a structural welder. He subsequently worked for various companies, including Halter Marine, Friede Goldman, and Accu-Fab. At the hearing, Mr. Nelson testified that once he returned to regular duty, he sometimes contacted Dr. McCloskey for Celebrex prescriptions for headaches and for authorization to receive chiropractic treatment. TR 57, 60. He confirmed that he did not see Dr. McCloskey from September 1994 through April 1999. TR 61. He recalled seeing Dr. McCloskey in 1999. TR 62. The records reflect that he saw Dr. McCloskey on August 2, 1999, and reported that his lower back pain came and went. RX-8, p. 168-169. Dr. McCloskey maintained the diagnosis of chronic post traumatic low back syndrome and prescribed Celebrex. RX-8, p. 174-175. Mr. Nelson testified that he did not see Dr. McCloskey from January 2000 through July 2003. TR 62. The records reflect that Mr. Nelson last received a prescription for Celebrex on January 7, 2000. CX-1, p. 178.

2003 Injury

On May 6, 2002, Mr. Nelson began working at Avondale. TR 31. Mr. Nelson testified that, at this point in time, his back was doing fairly well. TR 31. On July 9, 2003, he fell from scaffolding built on sawhorses, injuring his back. TR 34-35. He reported the accident to his supervisor and was sent to the medic the following morning. TR 35. The medic temporarily restricted him to light duty, and Avondale provided him a light duty job. TR 35.

Mr. Nelson sought follow-up treatment with Dr. Burwell on July 14, 2003. TR 36; CX-2. On this date, Dr. Burwell diagnosed lumbar spasm and strain and placed him at light duty. CX-2, p. 191. An MRI was performed on August 8, 2003, which revealed herniated discs at L4-5 and L5-S1. CX-2, p. 197-199. Dr. Burwell prescribed physical therapy for one to two weeks. CX-2, p. 199. Mr. Nelson returned to Dr. Burwell on August 22, 2003, at which time he requested a work restriction for limited walking. Dr. Burwell limited his walking distance at work to 200 yards. CX-2, p. 200. Mr. Nelson testified that in September 2003, Avondale placed him on worker's compensation and sent him home. TR 36. Dr. Burwell referred him to a neurosurgeon, Dr. Smith. TR 37-38.

Dr. Smith first saw Mr. Nelson on September 16, 2003. RX-7, p. 3-4. He ordered a discogram, which showed a disc herniation at L4-5 and an internal disc derangement at L5-S1. RX-7, p. 8; TR 38. On November 18, 2003, Dr. Smith recorded that Mr. Nelson was still having pain in the mid-lower back going into the left buttock and down the left leg, which sometimes gave out. RX-7, p. 14. He recommended lumbar fusion surgery. He recorded that Mr. Nelson was hesitant to proceed with surgery and indicated that he did not want to return to work and risk harming himself further. RX-7, p. 14. Mr. Nelson asked for two weeks to consider the surgery option. RX-7, p. 14.

On December 3, 2003, Carrier contacted Dr. Smith, provided him Dr. McCloskey's records, and inquired whether Mr. Nelson's current condition was a temporary aggravation of a pre-existing back injury and whether he was capable of returning to work. RX-7, p. 17. Dr. Smith responded on December 8, 2003. He wrote that he believed Mr. Nelson had sustained a temporary aggravation of his pre-existing condition and that he was capable of returning to work in the capacity to which he had been released by Dr. McCloskey in 1988. RX-7, p. 18. Mr. Nelson testified that he did not receive a copy of this letter until his attorney showed it to him and that Dr. Smith never informed him he could return to light duty work. TR 41. However, the last date he received a payment from Avondale was December 10, 2003. TR 43.

On January 6, 2004, Mr. Nelson returned to Dr. Smith and agreed to proceed with the surgery. RX-7, p. 20.

On May 3, 2004, Dr. Smith responded to Claimant's attorney's inquiry regarding the causation of Mr. Nelson's need for surgery. RX-7, p. 23. After reviewing Mr. Nelson's prior medical records, Dr. Smith concluded that the 2003 injury probably aggravated or worsened his preexisting back condition and that his need for surgery was "at least partially related to the 2003 work incident." Dr. Smith discussed that Mr. Nelson had obviously had back problems for years, based on the 1987 injury, Dr. McCloskey's notations of chronic posttraumatic low back syndrome in 1993, the FCE of 1994,[3] and his visit to Dr. McCloskey in 1999. RX-14, p. 16-17. Dr. Smith explained that Mr. Nelson then "worked for several years with minimal problems until the work incident of 2003, which probably aggravated or worsened his pre-existing back condition." RX-7, p. 23.

On May 31, 2004, Dr. Smith performed a lumbar decompression and fusion at L4-L5 and L5-S1. TR 43; RX-14, p. 5. After the surgery, Mr. Nelson continued to follow-up with Dr. Smith during his post-surgery ninety-day healing period.

In June 2004, Carrier wrote Dr. Smith with several inquiries in an attempt to determine Section 8(f) eligibility. The letter explained that as a result of the 1987 injury, Mr. Nelson had been assigned a permanent partial disability impairment of eight percent. As Mr. Nelson was still in recovery, Dr. Smith anticipated assigning four percent whole body impairment which would result in a twelve percent impairment when combined with his pre-existing eight percent impairment. Dr. Smith also replied that Mr. Nelson's pre-existing back condition made him more susceptible to another injury. He wrote that Mr. Nelson's earning capacity would be the same, because his restrictions would be essentially the same as those from the 1994 FCE. RX-14, p. 6-7.

Mr. Nelson next saw Dr. Smith on July 20, 2004. Dr. Smith noted that Mr. Nelson was noncompliant with wearing the back brace and with his activity level. RX-7, p. 27. His x-rays were good, the bone was starting to fuse, and he expected MMI at the next visit. RX-7, p. 27. Dr. Smith also recommended physical therapy, to which Mr. Nelson eventually agreed. TR 47. Mr. Nelson testified that he had attempted the recommended physical activity, but the amount of walking hurt his back. TR 45. He also explained that he wore the brace when walking, but not when sitting in a chair because it was uncomfortable. TR 46. Mr. Nelson then began attending physical therapy for an eighteen week period. TR 48.

[3] Dr. Smith noted that even though the 1994 FCE concluded Mr. Nelson was physically capable of returning to normal work activities, he was still complaining of back pain at that time. RX-7, p. 23.

On August 27, 2004, counsel took Dr. Smith's deposition for this case.[4] Dr. Smith testified that prior to recommending surgery, he ordered an MRI, which showed an annular tear at L4-L5 and a bulge at L5-S1. RX-14, p. 10-11. He stated that the discography unequivocally demonstrated that the L5-S1 disc was producing pain and that the L4-L5 disc was likely producing some pain. RX-14, p. 12. A follow-up CT scan indicated a disc herniation at L4-L5[5] and an internal disc derangement at L5-S1.[6] RX-14, p. 13. The interior disc derangement confirmed the discography's showing that L5-S1 was a pain generator.

At the time of the deposition, Mr. Nelson had not yet reached MMI. RX-14, p. 26. Dr. Smith testified that he expected to assign MMI on or around October 15, 2004, as five months was the typical healing time. RX-14, p. 32. He corrected the impairment rating he had rendered in his December 8, 2003 correspondence with Carrier. Dr. Smith testified that the 2003 injury caused five percent impairment, and Mr. Nelson had a preexisting eight percent impairment. RX-14, p. 28, 34. Under the AMA guides, these ratings and the double level spinal fusion resulted in thirteen percent whole body impairment. RX-14, p. 26.

Dr. Smith maintained his opinion in the May 3, 2004 letter to Claimant's counsel that the 2003 injury probably aggravated or worsened his preexisting back condition and that his need for surgery was at least partially related to the 2003 work incident. RX-14, p. 19. He opined that Mr. Nelson had a pre-existing back problem that originated from his 1987 injury and persisted for years. RX-14, p. 24. However, there was a period of several years when he had minimal problems and no significant medical treatment. RX-14, p. 24. The 2003 injury worsened his condition, contributing to his need for surgery. RX-14, p. 24. Dr. Smith stated that both the 1987 injury and 2003 injury contributed to Mr. Nelson's need for surgery. RX-14, p. 24.

Dr. Smith discussed Dr. McCloskey's records to support the statement that Mr. Nelson had a pre-existing back condition. Dr. Smith explained that Dr. McCloskey's 1993 diagnosis of chronic back pain syndrome meant that Mr. Nelson would always have some intermittent back pain. RX-14, p. 31. Dr. Smith also referred to Dr. McCloskey's August 2, 1999 notation of low back and left flank pain and absent left ankle reflex, explaining that these are symptoms of disc problems. RX-14, p. 29. Dr. Smith testified that Mr. Nelson's complaints in 1999 were the same complaints of pain as he had in 1994. RX-14, p. 31. Dr. Smith testified that the 1987 MRI showed problems at the same levels where the 2003 discogram and MRI showed problems. RX-14, p. 35-36.

[4] The deposition transcript indicates that it was taken on August 27, 2003; however, Employer/Carrier's counsel clarified that this date was incorrect. The correct date is August 27, 2004. TR 18.
[5] The disc was out of position.
[6] The interior of the disc was abnormal, but the disc can still be in the proper position.

Dr. Smith testified that when he saw Mr. Nelson in 2003, he similarly complained of pain radiating into his left leg. RX-14, p. 37. He testified that Mr. Nelson gave a very clear history of injury where he got worse after the injury. RX-14, p. 38. Dr. Smith testified that he did not doubt the veracity of Mr. Nelson, because his discography was compatible with his complaints and because he improved after the surgery. RX-14, p. 53. Dr. Smith testified that it was possible that Mr. Nelson's continued work in unrestricted employment for ten years could have contributed to his need for surgery. RX-14, p. 39.

Subsequent to the deposition, on September 21, 2004, Mr. Nelson returned to Dr. Smith after completing physical therapy. CX-4, p. 232. Dr. Smith noted that electrical stimulation was helpful, exercises were not helpful, and Mr. Nelson was not walking the recommended two miles per day. Dr. Smith documented that Mr. Nelson declined injections or a myelogram. Dr. Smith placed him at MMI and gave him the same work restrictions detailed in the 1994 FCE. CX-4, p. 232. At the hearing, Mr. Nelson testified that he did not refuse the myelogram, but indicated that he did not want surgery, regardless of the results of the myelogram. TR 49. He testified that September 21, 2004 was the last date he saw Dr. Smith, but he never received notification that he was released from Dr. Smith's care. TR 49. He testified that he still gets his prescriptions from Dr. Smith. TR 61. Mr. Nelson also believed that Dr. Smith told him he could have a second FCE conducted once he was released. TR 63.

Dr. Smith did not order an FCE. Mr. Nelson testified that his attorney arranged an FCE for him in New Orleans, Louisiana with Susan Smith. TR 49, 54. The FCE was conducted on November 29, 2004 and indicated that Mr. Nelson was "unable to meet the physical demands for sedentary or light work due to his inability to meet the physical demands of functional sitting and/or standing and walking more than household distances." CX-20, p. 524. Susan Smith recommended a second medical opinion for his back condition, including work conditioning therapy or a chronic pain management program. CX-20, p. 524-525.

Mr. Nelson testified that he has trouble bending, climbing, lifting, and squatting and that these activities cause pain in his back and leg. TR 50-51. He testified that when he sits too long, he hurts and starts to swell. TR 51. He testified that he typically uses an inflatable pillow behind his back when he sits. TR 52.

Mr. Nelson testified that he has not worked since September 2003 and Avondale has not offered him any work since that time. TR 41. He testified that he does not feel he is capable of working any job and that he is not capable of lifting seventy-five or fifty pounds. TR 52. Mr. Nelson testified that he is currently taking Talacen for pain that it causes headaches, and that Dr. Smith will not change his prescription. TR 33.

Vocational Evidence

Tommy Sanders, a certified rehabilitation counselor, performed a vocational assessment and labor market survey dated March 3, 2005. RX-15. Mr. Sanders conducted the labor market survey assuming Mr. Nelson had the capacity to perform medium-heavy physical activity, a maximum lifting of seventy pounds on an occasional basis, as recommended by the 1994 FCE and approved by Dr. Smith. The following jobs were within these physical capabilities. Wal-Mart in Pascagoula was hiring two full-time stockers, at a rate of $5.15 per hour. The job required frequent lifting of twenty-five pounds, occasional lifting of fifty pounds, and overhead lifting of two to ten pounds. It also required frequent squatting, bending, crouching, standing, walking, and use of upper extremities. Grand Casino in Biloxi was hiring three full-time dishwashers at a rate of $6.57 per hour. The job required occasional lifting of thirty pounds, frequent lifting of twenty pounds, pushing and pulling of twenty pounds, and occasional overhead lifting of fifteen pounds. It required occasional bending, stooping and squatting and frequent standing, walking and use of the upper extremities. Hudson's in Gautier was hiring two full-time stock clerks at a rate of $6.00 per hour. The job required occasional lifting of fifty pounds, frequent lifting of fifteen pounds, pushing and pulling of ten pounds, and occasional overhead lifting of five pounds. It required occasional bending, stooping and squatting and frequent standing, walking and use of the upper extremities. PFG Precision Optics in Ocean Spring was hiring two full-time optics polisher at a rate of $8.00 per hour. The job required occasionally pushing and pulling fifteen pounds and frequently lifting fifteen pounds. It required occasional standing and walking and frequent sitting and use of upper extremities. RX-15.

Mr. Sanders performed a labor market survey retroactive to November 2004 and found the following positions. Boomtown Casino was hiring three full-time custodians with wages of $7.00 per hour. The job required occasional lifting of thirty pounds, frequent lifting of fifteen pounds, occasional bending, and frequent standing, walking and use of the upper extremities. Penske Truck Leasing was hiring three full-time customer service representatives at a rate of $9.00 per hour. The reps would operate the fuel island, wash and vacuum trucks and drive as needed. The job required occasional lifting of twenty pounds, frequent lifting of ten pounds, frequent pushing and pulling of fifteen pounds, frequent standing and use of upper extremities, and occasional to frequent bending, crouching, squatting and climbing. RX-15.

Mr. Sanders performed a labor market survey retroactive to October 2004 and found the following positions. Ocean Springs Hospital was hiring a 35-hour per week environmental service aid with wages of $6.50 per hour. The job required occasional lifting of forty pounds, frequent lifting of fifteen pounds, frequent pushing and pulling of ten pounds, occasional to frequent bending, stooping and twisting and frequent standing, walking and use of the upper extremities.

Mr. Sanders reported that lighter occupations in the medium category were currently available, or had been available since approximately October 2004. Classy Chassis Car Wash in Pascagoula was hiring a cashier with wages of $5.15 per hour. Employee could sit or stand as needed, maximum lifting was five pounds, and employee would stock car accessory products which involved infrequent bending or squatting. Subway Sandwich in Moss Point was hiring a 30-hour work week sandwich maker at a rate of $5.15. per hour. The job involved frequent standing, walking and use of the upper extremities and occasional squatting and bending. It required occasional lifting of ten pounds and frequent lifting of three pounds. Yellow Cab in Pascagoula was hiring three cab drivers, who were compensated with forty percent of the fares plus tips. Gross income was approximately $20,000 per year, but work was in excess of forty hours per week. Applicants were required to have a commercial driver's license and may require bonding.

Mr. Sanders noted that according to the most recent FCE, Mr. Nelson would not be a likely job placement candidate at this time. However, his treating physician had indicated that he was capable of returning to work as per the 1994 FCE.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. §919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Main v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from §3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from §2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. Claimant was injured while employed as a structural welder on vessels at Northrop Grumman Ship Systems, Inc. JX-1. The Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic

Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986). In addition, if a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st cir. 1981).

In this case, the parties have stipulated that Claimant had an accident at Northrop Grumman ("Avondale") on July 9, 2003. See JX-1. Claimant testified that he suffered injury to his back when he fell from scaffolding constructed over sawhorses. TR 34-35. He reported the accident to Avondale on the same day. See JX-1. He was seen by Dr. Burwell on July 14, 2003, who diagnosed lumbar spasm and ordered an MRI that revealed herniated discs at L4-5 and L5-S1. CX-2, p. 191. The Court finds that Claimant has established both elements of a *prima facie* case. The medical record establishes that he sustained physical harm, and Claimant's unrefuted testimony establishes that his fall from the scaffolding is an accident that could have caused his back injury. Accordingly, Claimant has made a *prima facie* case of compensability and is entitled to the § 20(a) presumption.

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

To rebut the §20(a) presumption, Employer argues that Claimant's 2003 injury was only a temporary aggravation of his pre-existing 1987 injury. Employer submits evidence that the 1987 injury caused abnormalities at the L4-L5 and L5-S1 levels, the same levels affected by the 2003 accident. CX-1, p. 24-25. Employer contends that Claimant was originally restricted to light duty work as a result of his 1987 injury, that he received an award of permanent partial disability benefits due to a loss of wage-earning capacity, and that he returned to medium heavy work after receiving a lump sum settlement for the 1987 injury. After injuring his back in 2003 while working his medium heavy duty job at Avondale, he was eventually released to return to work in his usual capacity. Employer argues that the release to work with the same post-1987 injury restrictions shows that Claimant's most recent injury was only a temporary aggravation.

Additionally, Employer relies upon Dr. Smith's correspondence with Carrier, where he stated that the 2003 injury was a temporary aggravation of the pre-existing back injury. CX-4, p. 247. Employer also relies upon Dr. Smith's deposition testimony that Claimant had identical complaints after both injuries and that the 1987 MRI and the 2003 discogram both revealed problems at L5-S1. RX-14, p. 35-37. Based on this evidence, Employer has successfully produced substantial evidence showing that Claimant had a pre-existing back injury of a permanent nature that was similar to his 2003 injury. The Court finds this evidence to be sufficient to cause a reasonable mind to accept the conclusion that Claimant's pre-existing back injury could have been temporarily aggravated by his 2003 accident; therefore, Employer has rebutted the §20(a) presumption.

Because Employer has rebutted the § 20(a) presumption, the issue of causation of Claimant's back condition must be resolved based on the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991). In this case, Claimant sustained two separate and distinct injuries, in 1987 and in 2003. Under the "aggravation rule," where a new injury worsens or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the new injury alone, the entire existing disability is compensable. Strachan Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986). When a second injury aggravates a claimant's prior injury, liability must be assumed by the employer or carrier for whom claimant was working when "reinjured." Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g 15 BRBS 386 (1983). Employer argues that it escapes liability because the 2003 injury caused only a temporary aggravation of the 1987 injury and no greater disability resulted. Claimant argues that Employer is liable for his total disability because the 2003 injury worsened his 1987 injury such that he required surgery and suffered a greater disability.

Based on the evidence as a whole, the Court finds that the 2003 injury was an aggravation of Claimant's preexisting back condition that caused him greater disability. First, Dr. Smith clearly stated in his deposition that Claimant's 2003 injury worsened his pre-existing back condition and contributed to his need for surgery. RX-14, p. 24. He stated that Claimant gave him a very clear history of injury, where his condition worsened after the 2003 injury. RX-14, p. 38. This testimony echoes Dr. Smith's statements in the May 2004 correspondence with Claimant's attorney. RX-7, p. 23. The Court finds this deposition testimony weightier than Dr. Smith's statement in his December 2003 correspondence with Carrier that the injury was a temporary aggravation. The Court finds the deposition testimony to be a more accurate and complete reflection of Dr. Smith's medical opinion because, unlike the correspondence, it was conducted post-surgery and afforded both parties the opportunity to question Dr. Smith. Second, Claimant's increase in disability is evidenced by his increased impairment rating. Dr.

Smith testified that Claimant had a preexisting eight percent impairment rating, which increased to thirteen percent impairment as a result of the spinal fusion. RX-14, p. 26.

Claimant's 2003 injury combined with and aggravated his pre-existing back condition to produce an overall greater disability. Claimant was an employee of Avondale at the time of his 2003 injury. Therefore, under the "aggravation rule," the Court finds Employer, Avondale, liable for the totality of Claimant's current disability.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties dispute the date of maximum medical improvement ("MMI"). Employer asserts that Claimant reached MMI on the date assigned by Dr. Smith, September 21, 2004. Claimant contends that Dr. Smith's release was premature and that he has not yet reached MMI because he still experiences pain. The Court finds that Claimant reached MMI on September 21, 2004. Contrary to Claimant's argument, this date is consistent with Dr. Smith's testimony at deposition. Dr. Smith's deposition was taken while Claimant was still in the healing period, and Dr. Smith anticipated that Claimant's date of MMI would be approximately five months after the surgery, which would fall at October 15, 2004. However, he testified that Claimant may recover a little earlier or a little later. RX-14, p. 32. The Court finds that assigning a September 21, 2004 MMI date is reasonable given this testimony. The appropriate date of MMI is the date on which a medical decision is made that further treatment will not improve the condition. On September 21, 2004, Claimant rejected Dr. Smith's suggested treatment of injections and a myelogram. CX-4, p. 232. As Claimant chose to forgo these suggestions and to treat his pain only with prescription medications, the Court finds it reasonable that Dr. Smith placed Claimant at MMI on this date. Based on the foregoing, the Court finds that Claimant's date of maximum medical improvement is September 21, 2004.

When Dr. Smith placed Claimant at MMI, he assigned "work restrictions as detailed in Claimant's 1994 FCE," which restricted Claimant to medium heavy work. RX-7, p. 28. Claimant argues that these restrictions are outdated and relies upon a more recent FCE conducted by Susan Smith on November 13, 2004, which concludes that he is not capable of any work activity. Initially, the Court notes that the 1994 FCE was conducted over ten years prior to Claimant's date of MMI and was conducted prior to the lumbar fusion surgery. Given the staleness of the FCE and the change of circumstances since that time, the Court finds it to be an unreasonable basis for Dr. Smith's restrictions. Further, the medium heavy capability determined by the FCE, which allows for maximum lifting of seventy-five pounds is clearly beyond the limitations Dr. Smith testified that he typically renders after a lumbar fusion surgery: maximum lifting of fifty pounds and avoidance of repetitive bending, twisting and stooping. RX-14, p. 47. Dr. Smith testified that these restrictions could be tighter or looser depending on the results of a patient's FCE. RX-14, p. 47. Yet, in this instance, Dr. Smith did not order an FCE for Claimant. At the hearing, Claimant testified that he has difficulty bending, lifting, and squatting, and that when he sits too long, he experiences swelling. TR 51. The Court finds that these symptoms combined with Claimant's increased post-surgery impairment rating warrants a more recent FCE to accurately determine Claimant's current physical capabilities. Given Employer's failure to submit a current, up-to-date FCE, the Court is forced to rely upon the November 2004 FCE submitted by Claimant. The November 2004 FCE concludes that Claimant is unable to do even sedentary or light work, restricting him from all work activity.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Pursuant to the 2004 FCE, Claimant has established a *prima facie* case of total disability, because he cannot return to his usual employment as a welder. Additionally, the 2004 FCE's conclusion the Claimant is capable of neither sedentary nor light duty activity, renders Employer's vocational reports ineffective in establishing suitable alternative employment ("SAE"). The 2004 FCE's results render Claimant incapable of any work, not to mention the medium heavy and medium duty positions found by Mr. Sanders. Therefore, Employer cannot establish SAE within Claimant's physical capabilities. Because Employer has failed to establish SAE, the Court finds that Claimant is totally disabled.[7] See 33 U.S.C. § 908(c).

Accordingly, the Court finds that Claimant was temporarily totally disabled from September 4, 2003[8] through September 20, 2004 and permanently totally disabled from September 21, 2004 and continuing.

[7] As Claimant is permanently totally disabled, he has sustained a complete loss of wage earning capacity. Employer assumes that Claimant can work at his pre-1987 capacity and argues that since he has not sustained any loss of wage earning capacity, he should recover only temporary total disability. However, the Court finds that Claimant has suffered a greater loss in wage earning capacity as a result of the 2003 injury and, therefore, can recover permanent total disability benefits.

[8] See JX-1.

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The inquiry focuses on whether the employment was intermittent or permanent. Gilliam v. Addison Crane Co., 21 BRBS 91 (1987); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then §10(a) will apply. See Duncan v. Washington Metro. Area Transit and Auth., 24 BRBS 133, 136 (1990). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976). In this case, there is no evidence in the record as to the number of days Mr. Nelson actually worked during the measuring year. Without such information, the Court cannot arrive at an accurate average daily wage, and, therefore, §10(a) is inapplicable to this case.

Because Section 10(a) is not applicable, the Court will look to §10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under §10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that §10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to §10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). Both parties agree that Claimant's earnings during the 52 weeks prior to his accident amount to $29,288.27. CX-9. These wage records indicate that Claimant earned $29,288.27 during the 52 week period from July 7, 2002 through July 6, 2003. Dividing $29,288.27 by 52 weeks yields a weekly wage of $563.24. To calculate Claimant's annual wage earning capacity, the Court multiplies $563.24 by 52 weeks, to yield an annual wage earning capacity of $29,288.27. Pursuant to §10(d), the average

weekly wage is calculated by dividing $29,288.27 by 52 weeks, yielding an average weekly wage of $563.24. The Court finds that this figure fairly represents a calculation of Claimant's average weekly wage at the time of his work injury and is acceptable under §10(c), a section under which the Court has wide discretion.

CREDIT DOCTRINE

Employer argues that it should be credited Claimant's settlement award for permanent partial disability benefits resulting from his 1987 back injury, because Claimant should not be made more than whole by doubly recovering for an aggravation of that same injury. Claimant responds that the settlement payment he accepted in 1993 abrogated his prior award of permanent partial disability and that there is no authority which allows Employer to receive a credit for a settlement payment. The Court agrees with Claimant.

The credit doctrine was developed as a limit on the aggravation rule in order to prevent double recoveries where the worker has been actually compensated for the same disability at a previous point in time. Strachan Shipping Co. v. Nash, 782 F.2d 513, 518 (5th Cir. 1986). The second employer is entitled to credit for compensation actually paid to the claimant for the previous disability. Id. at 520. Concurrent awards received by a claimant cannot exceed 66 2/3 percent of the average weekly wage maximum of Section 8(a). 33 U.S.C. § 908(a); Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997).

Employer's argument relies upon the rationale that Claimant is now no worse off than he was after his 1987 injury. However, the Court has found that Claimant now suffers greater work restrictions than those given in the 1994 FCE, resulting in permanent total disability. Clearly Claimant has suffered a loss of wage-earning capacity beyond that for which he was compensated in his settlement of his prior permanent partial disability award. While Employer is correct to cite Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997), for the proposition that a claimant's concurrent awards cannot exceed 66 2/3 percent of the average weekly wage maximum under Section 8(a), this case does not lend any credence to the suggestion that Employer should receive credit for Claimant's lump sum settlement payment. In fact, Hansen suggests the opposite. In Hansen, the Board remanded the case to the ALJ to determine whether the concurrent payments at issue were advances on a settlement or were actually permanent partial disability payments. In so doing, the Board suggested that the second employer would be unable to receive credit for a prior settlement paid by a previous employer, but would only be allowed credit for permanent partial disability award payments. Accordingly, in the instant case, Employer is entitled to no credit for Claimant's prior lump sum settlement.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). In the instance of multiple injuries, the employer at the time of the aggravating injury assumes liability for all subsequent related medical expenses and compensation. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

Claimant has established that his current disability is at least partially the result of his July 2003 accident at Avondale. Therefore, the Court finds that Employer is liable for all past and future compensable medical benefits arising from Claimant's July 2003 back injury.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in § 44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142, 146 (1997); 33 U.S.C. § 908 (f) and § 944. To be entitled to compensation under § 8(f) when the employee is permanently totally disabled, the employer must establish that the employee seeking compensation had: (1) an "existing permanent partial disability" before the employment injury; (2) that the permanent partial disability was "manifest" to the employer; and (3) that the current disability is not due solely to the employment injury. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries Inc., 14 BRBS 974, 976 (9th

Cir. 1982), cert. denied, 459 U.S. 1104, 113 S.Ct. 726, 74 L.Ed. 2d 951 (1983); 33 U.S.C. § 908(f)(1). When an employee is permanently partially disabled, but not totally disabled, § 8(f) requires the employer to make the additional showing that the ultimate permanent partial disability is materially and substantially greater than a disability from the work related injury alone. Newport News Shipbuilding and Dry Dock v. Director, OWCP (Harcum II), 131 F.3d 1079, 1081 (4th Cir. 1997).

An "existing permanent partial disability" under § 8(f) can be (1) a scheduled disability in §§ 8(c)(1)-(20); (2) a serious, lasting condition that causes an actual loss of wage-earning capacity; or (3) a serious physical disability-in-fact that would motivate a cautious employer to discharge the handicapped employee because of a greatly increased risk of an employment-related accident and compensation liability. C&P Tel. Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977). The mere fact that an employee sustained a past injury does not establish that he had a pre-existing permanent partial disability. Rather, the injury must cause a serious, lasting physical problem. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991); Director, OWCP v. Campbell Indus., 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

The evidence in this case establishes that Claimant had an existing permanent partial disability to his back prior to his 2003 work injury at Avondale. On January 8, 1987, he suffered a back injury while employed at Ingalls. TR 26. As a result, he was diagnosed with lumbar disc disease and chronic post traumatic low back syndrome. RX-8, p. 41, 150. Dr. Smith's testimony established that a diagnosis of chronic back pain syndrome meant that Claimant would always experience intermittent back pain. RX-14, p. 31. Claimant was assigned an eight percent whole body impairment rating for this disability. Based on the foregoing, the Court finds that a cautious employer would determine that Claimant's pre-existing back disability greatly increased the employer's risk of an employment-related accident and compensation liability.

The Director argues that Claimant's release from his light duty work restrictions in 1994, which allowed him to return to his usual employment, indicates that he did not have an existing permanent partial disability at the time of his 2003 injury. However, "disability" under § 8(f) is not limited to economic disability. The Court finds that despite Claimant's release to regular duty, his back condition continued to be of a serious nature that would cause concern to a cautious employer. Claimant was continuously treated for the condition from 1987 through 1994 and, as Dr. Smith testified, the possibility of future back problems was never eliminated, even when his work restrictions were lifted. Dr. Smith also indicated that Claimant's pre-existing back condition rendered him more susceptible to another injury. RX-14, p. 6-7. Therefore, the Court finds that Claimant's pre-existing disability in his back is sufficient to satisfy the first requirement of 8(f).

Employer has additionally established the second requirement of 8(f): that the permanent partial disability was "manifest" to the employer. The employer need not have actual knowledge; constructive knowledge suffices so long as the condition is documented in medical records prior to the subsequent injury. Director, OWCP v. Universal Terminal & Stevedoring (DeNichilo), 575 F.2d 452, 8 BRBS 498 (CRT) (3rd Cir. 1978); American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). As previously discussed, Dr. McCloskey's medical records reflect that Claimant was diagnosed with lumbar disc disease and chronic post traumatic low back syndrome. RX-8, p. 41, 150. His medical records also contain abnormal MRI's and CAT scans, as well as evidence that Claimant was taking prescription medication for pain for an extended period of time. Based on these records, Employer had constructive knowledge of Claimant's pre-existing disability.

Lastly, the third requirement of 8(f) requires Employer to establish that Claimant's current disability is not due solely to his 2003 employment injury. The Court finds that Employer has presented evidence sufficient to meet this requirement. After reviewing Claimant's prior medical records, Dr. Smith opined that Claimant's pre-existing back problem combined with his 2003 work injury at Avondale to make him materially and substantially more disabled than he would have been if he did not have the pre-existing condition. RX-14, p. 41. Additionally, Claimant's current overall thirteen percent impairment rating is the result of both injuries. Dr. Smith testified that Claimant's pre-existing injury caused eight percent impairment and his 2003 injury caused five percent impairment, resulting in a thirteen percent post-surgery impairment rating. RX-14; p. 26-28, 34. Dr. Smith further testified that it was the combination of the two injuries that caused claimant's need for surgery. RX-14, p. 24. Contrary to the Director's argument, the Court finds Dr. Smith's testimony as a whole to be more than a conclusory statement and sufficient to establish the third requirement of 8(f).

Based on the foregoing, the Court finds that Employer has met the requirements of Section 8(f) and is entitled to Special Fund relief.

§ 14(E) ASSESSMENT

Section 14(e) provides that if employer fails to pay compensation voluntarily within 14 days after it becomes due, as set out in Section 14(b), employer shall be liable for an additional 10 percent added to unpaid installments. This procedure operates unless employer filed a timely notice of controversion, as provided in Section 14(d), or unless the deputy commissioner excuses the failure to pay compensation voluntarily upon a showing by employer that, because of conditions beyond its control, it could not make timely payments. 33 U.S.C. § 914(e).

The Court finds that Employer is not liable for the Section 14(e) penalty. Employer immediately began paying Claimant at the appropriate rate on September 2, 2003; the approximate date Claimant states Avondale ceased providing him with light duty work. Employer ceased making payments on December10, 2003. However, Employer filed a Notice of Controversion on September 18, 2003, thus Employer successfully controverted the claim before ceasing to make payments. Accordingly, the Court finds that Employer is not subject to the 14(e) penalty.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). In awarding a fee, the administrative law judge must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Employer paid Claimant temporary total disability benefits from September 4, 2003 through December 10, 2003, at a rate of $375.49 per week, based on an average weekly wage of $563.24. See JX-1. This Court has awarded Claimant temporary total disability from September 4, 2003 through September 20, 2004 and permanent total disability from September 21, 2004 and continuing, based on an average weekly wage of $563.24. Claimant has succeeded in obtaining compensation beyond December 10, 2003, the last date Employer paid benefits to Claimant. Therefore, the Court finds that Employer is liable for Claimant's reasonable attorney's fees.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer shall pay to Claimant compensation for temporary total disability from September 4, 2003 through September 20, 2004, based on an average weekly wage of $563.24.

2) Employer shall pay to Claimant compensation for permanent total disability, based on an average weekly wage of $563.24, commencing on September 21, 2004, and continuing for a period of 104 weeks, after which time such permanent total disability benefits shall be paid from the Special Fund pursuant to Section 8(f) of the Act. In addition, such compensation shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act. The cost of living adjustment shall be effective retroactively to September 21, 2004.

3) Employer shall be entitled to a credit for all payments of compensation that it previously made to Claimant.

4) Employer shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

5) Employer shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's employment-related back injury.

6) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

7) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge